FORM NLRB 5026
(2-85)

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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

TO Emil C. Farkas, Director
Region 9

DATE June 16, 1986

FROM Harold J. Datz, Associate General Counsel
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SUBJECT Bobby Fisher, Inc.
Case No. 9-CA-22816

This memorandum confirms our June 5, 1986 telephone conversation with Regional personnel. This case was submitted for advice as to whether the Employer violated Section 8(a)(3) and (1) of the Act by: (1) replacing an employee who was not working due to a disability; and (2) terminating payments for health insurance on behalf of that employee; because his fellow bargaining unit members engaged in a strike. This case was also submitted on whether either of the above allegations would be 10(b) barred.

FACTS

Bobby Fisher, Inc. (the Employer), a wholesale beer and wine distributorship in the Springfield, Ohio area, had a collective bargaining agreement with Teamsters Local 957 (the Union) that expired on May 31, 1985. 1/ On June 4, the Union went out on strike. On June 5, the Employer hired a full complement of employees to replace the strikers.

James Brunner, a driver for the Employer, had a cataract operation in January 1984 and missed approximately two months of work due to that disability. He returned to work until April 1985 when he had a second cataract operation. He was receiving disability insurance benefits because of that operation, when on May 6 he sustained a non-work related disabling knee injury. The Employer continued to provide Brunner with health insurance. 2/ On June 10, Brunner and the other unit employees received a letter from the Employer's insurance carrier

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1/ All dates hereafter are in 1985, unless otherwise noted.

2/ The Region concluded that the Employer was under no contractual obligation to provide health insurance to an employee on disability. However, the Employer has consistently done so in the past. For example, one employee, Floyd Neuhart, was on a non-work related disability for approximately 3 1/2 months, and the Employer continued health insurance payments on his behalf.

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advising that the Employer was ceasing payments retroactive to June 1, but that the employees could continue the insurance by making payments themselves. Brunner did not opt to continue his insurance. However, under the terms of the policy, his insurance coverage continued automatically for three months because he was on disability at the time of termination of the payments.

Brunner did not participate at all in the strike until early September, when he picketed on two occasions. Brunner did not contact the Employer from the inception of the strike until October 1, when Brunner wrote the Employer a letter. Brunner informed the Employer that his doctor had said that Brunner was unable to perform the duties of a driver until he had knee surgery. He asked the Employer to put him on layoff status so that he could collect unemployment, or to put him on light duty. He also asked for a letter of recommendation should he seek other employment. On October 7, Brunner received the following letter from the Employer:

> To Whom It May Concern:
>
> James Brunner was an employee from November 21, 1971 until June 1, 1985. He was a very valuable, trustworthy, dependable and honest employee. You could always depend on him for being on time for work, and know the job would be completed as it should be.

On November 19, the Union sent a letter to the Employer concerning the lack of progress in contract negotiations and made an unconditional offer of return to work on behalf of all of its members employed or formerly employed by the Employer, to be effective November 25. The Employer advised the Union that the striker replacements were permanent. On December 4, the Union filed a charge in Case 9-CA-22652 alleging that the Employer violated the Act by "[o]n or about November 25, 1985, in order to discourage membership in [the Union], discriminat[ing] in regard to the hire and tenure of employment of James Brunner [and other named employees], by failing to recall said employees to work following an unconditional offer to return to work being made on their behalf. Said actions on the part of the Employer violate[d] Section 8(a)(3) of the Act." On January 24, 1986, the Region dismissed the charge because they concluded it was an economic strike, the Union took an appeal, and the issue of striker status is presently pending in the Office of Appeals.

On January 28, 1986, Brunner filed the instant charge alleging that the Employer violated Section 8(a)(3) and (1) of

the Act by "[o]n or about October 7, 1985, . . . discharg[ing] James Brunner for his activities on behalf of the [the Union]."

ACTION

We concluded that James Brunner's replacement on June 5 violated Section 8(a)(3) and (1) of the Act and that this allegation in Case 9-CA-22816 would not be 10(b) barred. We also concluded that an arguably meritorious allegation in Case 9-CA-22816 concerning the termination of insurance benefits would be 10(b) barred and that the charge in Case 9-CA-22652 was not broad enough to support this particular allegation in a complaint.

An employer is not required to finance a strike. Thus, upon commencement of a strike, an employer may replace the strikers 3/ and cease paying wages and other similar costs, such as insurance premiums, on behalf of the strikers. 4/ An employer may not, however, withhold payment of already earned or accrued benefits contingent upon the cessation by employees of a legitimate economic strike. 5/ In addition, an employer cannot group employees on approved medical leave at the commencement of the strike with strikers, for purposes of exercising the above-mentioned lawful actions to avoid financing a strike. 6/ Thus, as noted in E.L. Wiegand, supra, "employees [have] a Section 7 right to refrain from declaring their position on [a] strike

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3/ NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345 (1938).

4/ See, e.g., Sherwin-Williams Co., 269 NLRB 678 (1984)(health insurance premium); Simplex Wire & Cable Co., 245 NLRB 543, 545-46 (1979)(health insurance premium); Towne Chevrolet, 230 NLRB 479, 479 (1977)(insurance premium); Sargent-Welch Scientific Co., 208 NLRB 811, 821-22 (1974)(group insurance contribitution); Ace Tank and Heater Co., 167 NLRB 663, 664 (1967)(medical insurance premiums); General Electric Co., 80 NLRB 510, 511-12 (1948)(wages).

5/ See, e.g., NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32-35 (1967); Wallace Metal Products, Inc., 244 NLRB 41, 41 n. 2, 48 (1979)(vacation pay); Knuth Bros., Inc., 229 NLRB 1204 (1977)(vacation pay), enfd. 584 F.2d 813 (7th Cir. 1978).

6/ See, Conoco, Inc., 265 NLRB 819 (1982), enfd. 116 LRRM 3463 (10th Cir. 1984); Texaco, Inc., 259 NLRB 1217, 1222 (1982), enfd. 112 LRRM 3206 (5th Cir. 1983); E.L. Wiegand Division, 246 NLRB 1143 (1979), enfd. in rel. part 650 F.2d 463 (3rd Cir. 1981).

while they [are] medically excused." 246 NLRB at 1143. Moreover, even active participation in a strike by a disabled employee does not justify post hoc an employer's termination of any accrued benefit until the disability has terminated. Conoco, Inc., supra. Similarly, we believe this rationale prohibits an employer from replacing a disabled employee merely because other unit employees are on strike.

In the instant case, therefore, we concluded that the Employer clearly violated Section 8(a)(1) and (3) of the Act when it grouped James Brunner with the strikers on June 5 and replaced him. 7/ On that date, Brunner was not working due to a non-work related disability. There is no evidence to establish that Brunner was able to work when he picketed in September. Under these circumstances, the decision to discharge Brunner is akin to a decision to terminate sick and accident benefits to a disabled employee because of a strike, and under Conoco constitutes a violation of the Act.

We also concluded that the discharge allegation in the charge in Case 9-CA-22816 is not time-barred under Section 10(b). Thus, in United States Postal Service Marina Center, 271 NLRB 397, 400 (1984), the Board concluded that the Section 10(b) period begins to run when there is "unequivocal notice" of a decision alleged to be an unfair labor practice, rather than the later date on which that decision is implemented. Hence, the

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7/ The Employer asserts as alternative defenses that Brunner resigned on October 1 and that earlier Brunner was a striker and was therefore replaced on June 5. As to the resignation defense, we noted that if the Employer considered Brunner's October 1 letter to be a resignation, then the Employer's October 7 letter would have referred to Brunner as an employee from November 21, 1971 until October 1, 1985, rather than until June, 1985. (Apparently, the June 1, 1985 reference actually meant the June 5th strike date because the Employer has since placed Brunner on the same preferential hire list as the strikers who were replaced on June 5). Therefore, we believe that the Employer's asserted belief that Brunner had resigned is refuted by his own words and actions. Also, we do not view Brunner's October 1 letter to actually constitute a resignation since he requested to be put either on layoff status or light duty because of his continued disability. Accordingly, this letter, in our view, contemplates continued employee status. Brunner apparently requested a letter of recommendation only for the purpose of seeking supplemental work in the event the Employer could not assign him light duty work.

10(b) issue in the instant case turns on when Brunner was given "unequivocal notice" that he was considered by the Employer to be part of the group of strikers replaced on June 5. That clearly did not occur until October 7, even assuming that the October 7th letter of recommendation constitutes such a clear and unequivocal notice. In this regard, we conclude that the Employer's replacement of strikers on June 5, and the subsequent newspaper articles reporting on their replacement, would not amount to "unequivocal notice" to Brunner that he was considered by the Employer to be a striker and therefore replaced. Thus, the newspaper article did not specifically name Brunner as a striker who was replaced. As an employee on disability, Brunner was entitled to presume that the Employer would act lawfully and maintain his employment status. Consequently, Brunner was not put on "unequivocal notice" that he was considered replaced on June 5 at least until he received the Employer's letter of recommendation on October 7. Accordingly, the charge in Case No. 9-CA-22816 was timely filed as it relates to Brunner's discharge.

We also concluded that, irrespective of its merits, the allegation concerning the discontinuance of health insurance to Brunner is Section 10(b)-barred. Thus, this allegation, if covered at all by the charge in Case 9-CA-22816, is untimely since the "unequivocal notice" of discontinuance occurred on June 10 and the charge was not filed until January 28, 1986. Moreover, although the Union's charge filed on December 4 in Case 9-CA-22652 would be timely with respect to this allegation, we concluded that the charge in that case was not broad enough to encompass such a complaint allegation.

In NLRB v. Fant Milling Co., 360 U.S. 301, 307-08 (1959), the Supreme Court acknowledged that "[t]o confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights." The Court went on to hold that a separate charge need not be filed in order for the General Counsel to include additional allegations in a complaint, so long as the added allegations are unfair labor practices "which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." 360 U.S. at 309. The Court cautioned, however, that the Board does not have "carte blanche to expand the charge as they might please, or to ignore it all together." 360 U.S. at 309. 8/

8/ See Red Food Store, 252 NLRB 116, 118-122 (1980)(for discussion of case law since Fant Milling).

The Board has applied the principles enunciated in Fant Milling to grant the General Counsel discretion to add to a complaint allegations not specified in a charge so long as the allegations are not "completely outside of the situation which gave rise to the charge" such that the General Counsel "may be said to be initiating the proceeding on its own motion. . ." NLRB v. Kohler Company, 220 F.2d 3, 7 (7th Cir. 1955). In Hunter Saw Division of Asko, Inc., 202 NLRB 330 (1973), the complaint alleged that a layoff of three employees in November 1971 had been instigated by a grievance filed by one of the three. The underlying charge, however, referred only to the failure to recall from layoff in January 1972 the employee who had filed the grievance. The Board dismissed the allegation concerning the November 1971 layoff because the original charge "made no reference, direct or indirect, to any other unlawful conduct." 202 NLRB at 330 n. 1. In Allied Industrial Workers of America (Warren Molded Plastics Inc.), 227 NLRB 1541 (1977), an employee filed a charge on December 27, 1975, complaining that her union had brought intra-union charges and levied excessive fines against her because of her activity on behalf of another union. The charge also set out a "broad general allegation of 8(b)(1)(A) restraint and coercion." On June 18, 1976, outside the 10(b) period, the employee amended the charge to allege that the union had unlawfully expelled her from a union meeting on June 27, 1975, and the complaint as issued contained only the latter allegation. The Board dismissed the complaint because "the original and amended charges allege distinct and separate violations even though the broad language concerning 8(b)(1)(A) restraint and coercion . . . appears in both. In effect the amended charge contains new matter and omits the specifics of the original charge, as does the complaint." 227 NLRB at 1541. And finally, in Millwright and Machinery Erectors, Local Union 720, 274 NLRB No. 219 (1985), employee Wallace filed a charge on January 23, 1984 alleging that the union bypassed her on the out-of-work list and thereafter harassed, intimidated, and coerced her because she questioned the referral process. On February 14, 1984, Wallace amended her charge to allege that she was bypassed on September 29, 1983, and that another employee, Martinez, was by-passed on July 27, 1983, for arbitrary, invidious, and discriminatory reasons. The complaint that issued alleged the failure to refer Wallace and Martinez. The Board dismissed the allegations concerning Martinez because they were "separate and distinct acts, carried out at different times, for different reasons." The Board noted that neither charge alleged an unlawful pattern or practice, the violations were not temporally related since the failure to refer Martinez occurred approximately two months before Wallace's non-referral, and the complaint's theories and the proffered evidence concerning each incident were different. Accordingly, the Board concluded "the

two incidents were not closely related and did not arise out of the same course of conduct." 274 NLRB No. 219, slip op. at 4-5. 9/

In the instant case, the termination of health insurance occurred almost six months before the failure to recall the strikers. In addition, the charge in Case 9-CA-22652 only alleges the Employer's failure to recall the strikers as the violation, and specifically names James Brunner as a striker. There is no other broad language in the charge. Moreover, the Union's failure to recall allegation is in no way related to the cessation of benefits allegation since in fact the Union's charge treats James Brunner as a striker with no entitlement to continued health insurance. In this respect, neither the Union nor the Region considered the cessation of benefits to be violative of the Act at that time. It was not until the Region

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9/ Compare Clark Equipment Co., 278 NLRB No. 85 (1986) and Kelly-Goodwin Hardwood Co., 269 NLRB 33 (1984). In Clark Equipment, the complaint alleged numerous independent violations of Section 8(a)(1) of the Act, despite the fact that the original charge and the amended charge did not contain any 8(a)(1) allegations, but only 8(a)(3) and (5) conduct. The Board relied on the printed language of the charge form, i.e., "[b]y the above acts and other acts . . . the [Employer] has interfered with, restrained and coerced . . ." and concluded that the charge(s) were sufficiently broad to encompass the complaint allegations. In a footnote, however, the Board stressed the importance of following the guidelines set forth in the Casehandling Manual which state that "[i]f the allegations of the charge are too narrow," an amendment should be sought. Casehandling Manual Sec. 10064.5. In Kelly-Goodwin, the original charge alleged that the respondent had violated Section 8(a)(5) and (1) of the Act by repudiating its collective- bargaining agreement with the union, unilaterally changing terms and conditions of employment, and locking out two employees. An amended charge was filed alleging a Section 8(a)(3) and (1) violation by hiring temporary replacements for the two locked-out employees, and providing better benefits. The lockout of the two employees, and the hiring of the replacements, occurred on the same day, more than six months prior to the amended charge, but less than six months prior to the original charge. The Board noted that "the amended charge alleges matters similar to, and arising out of the same course of conduct, as those alleged in the original charge" and that they are "virtually inseparable" and concluded that the amended charge was not Section 10(b)-barred. 269 NLRB at 37.

investigated Brunner's charge filed on January 28, 1986, that it discovered that Brunner was on disability leave at the time the Employer ceased providing health insurance. In all these circumstances, we concluded that, under Hunter Saw, Warren Molded, and Millwright and Machinery Erectors, the termination of health insurance to a non-striker is a separate and distinct violation from the failure to recall strikers. Accordingly, the Union's charge should not be used to support a complaint allegation concerning the termination of health insurance to James Brunner.

In sum, the Region should issue complaint, absent settlement, against the Employer in Case 9-CA-22816 alleging a violation of Section 8(a)(1) and (3) of the Act by replacing James Brunner on June 5.

H. J. D.